

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

GLORIA CHEN	:	
	:	
	:	
v.	:	D.T.E. 99-61-6
	:	
QWEST COMMUNICATIONS CORPORATION	:	
	:	

Motion to Appeal Hearing Officer's Ruling

Qwest Communications Corporation ("Qwest") hereby moves to appeal the Ruling of the Hearing Officer of the Department of Telecommunications and Energy (the "Department") dated February 14, 2002, issued in the above proceeding (the "Ruling").

1. Good Cause Exists to Accept the Appeal

The date of the Ruling is February 14, 2002 and the Hearing Officer allowed only one week, or February 21, 2002, to file an appeal to the Department. Qwest's counsel received the Ruling on February 19, 2001, only two business days before the expiration of the appeal period granted by the Hearing Officer. The decision was not mailed to Qwest.

Good cause exists for the Department to accept this appeal two business days after the appeal period set by the Hearing Officer. The Department has defined good cause as follows:

Good cause is a relative term and it depends on the circumstances of an individual case. Good cause is determined in the context of any underlying statutory or regulatory requirement, and is based on a balancing of the public interest, the interest of the party seeking the exception, and the interests of any other affected party.

See Re CMS Generation Co., D.P.U. 92-166-A (Nov. 12, 1993). Qwest's motion satisfies this standard.

First, the brief appeal period, combined with the mailing of the decision, allowed Qwest and its counsel two business days to act. Since Qwest's counsel received the Ruling on February 19, 2002, Qwest had only two business days to determine a course of action. Under the Department's rules, a hearing officer is required to "prescribe a reasonable time period for the submittal of the appeal . . ." 220 C.M.R. 1.06(6)(d)(3). Given the service of the Ruling by mail, one week was not a reasonable period of time for Qwest to make a reasoned determination on a course of action and to present an adequate appeal.

Second, good cause, according to the Department's definition, must consider the "context of any underlying statutory or regulatory requirement." D.P.U. 92-166-A. The underlying statute requires the Department to render its decision on a complaint of slamming within ten days of the hearing. M.G.L. c. 93, § 110(j). Here, the Department will render a decision soon on the merits, over two years after the hearing, which was held on October 6, 1999. Yet to deprive Qwest of a right to appeal for filing its appeal two days after an abbreviated appeal period would be quite an anomaly. Moreover, Qwest's motion to dismiss has been pending since December 10, 1999.

Third, the matter of this ten day requirement is already on appeal before the Supreme Judicial Court in the complaint of Patricia Garcia-Rios, D.T.E. 00-22, docketed as SJC-2002-0040. The identical issue is presented in this matter, along with the Hearing Officer's Ruling in the complaint of Carlos Cruz, D.T.E. 99-61-5. Qwest has filed a companion appeal to the Department in that matter as well. The public interest, according to the Department's definition of good cause, strongly suggests that these three matters be resolved together, and that Qwest should not be deprived of its right to appeal the ten day requirement in these two matters.

2. The Statute Sets Out Mandatory Deadlines That The Department Must Follow Before Rendering Any Punishment Under the Act

What follows is an abbreviated argument on appeal, given the short time frame to appeal.

The Department should reverse the Ruling of the Hearing Officer.¹ The statutory provision at issue provides that *"[w]ithin ten business days after the hearing the department shall render its decision."* G.L. c. 93, § 110(j) (emphasis added). In applying statutes governing its authority the Department has stated that it "cannot ignore the plain language of the Act, particularly when the Act is detailed and precise." See Commonwealth Elec. Light Co., D.P.U./D.T.E. 97-111 at 73 (Feb. 27, 1998); Western Massachusetts Elec. Light Co., D.T.E. 97-120 at 115 (Sept. 17, 1999) ("[T]he Department cannot ignore the plain language of the Act, particularly when the Act is detailed and precise. . . ."[U]nless and until the Legislature acts, the Department must follow the unequivocal language of the statute."). The Department cannot ignore this mandatory ten day statutory deadline, and reconsideration dictates that the Order should be vacated.

The Anti-Slamming Statute is detailed and precisely sets out the mandatory deadlines that the complainant, the Department, and the charged carrier must follow in the investigation and resolution of a slamming complaint. M.G.L. c. 93, § 110. In each case, the legislature expressed the obligations in mandatory terms, including the Department's obligation to render its decision within ten business days of the hearing. These mandatory deadlines must be read in light of the Department's extraordinary power to order refunds, levy fines, and revoke the right of a carrier to sell telecommunications services in Massachusetts for finding 20 violations in a 12-month

¹ The Hearing Officer listed in the Ruling, Kevin F. Penders, did not conduct the evidentiary hearing. Rather, Qwest's records show that the actual hearing officer was April Mulqueen. Given the shortness of the appeal period, Qwest has not had the opportunity to determine what affect that may have on its rights.

period. In no other context does the Department possess these extraordinary statutory powers to punish, and thus any punishment rendered must be done within the strict deadlines of the statute.

The central purpose of the statute is to provide redress to aggrieved consumers on an expedited basis, and to encourage carriers--through the mechanisms of refunds, fines and the potential loss of right to sell services in Massachusetts--to modify their conduct accordingly. These mandatory, abbreviated deadlines are central to the purpose of providing speedy redress to an aggrieved consumer. In no other statutory context is the Department subject to such detailed and precise mandatory deadlines. Quite clearly, the legislature intended strict compliance with these deadlines in granting to the Department these extraordinary penal powers.

The deadlines, combined with the penal nature of the statute, are designed to deter future violations and to encourage a carrier to modify its conduct in the marketplace. When those deadlines are not followed, particularly the ten day deadline to render a decision (for an additional 20 months), those dual purposes are frustrated, the statutory intent is defeated, and in particular here Qwest has been greatly prejudiced. Clearly, the legislature intended, that if the Department were to exercise the extraordinary penal powers, it must do so within a speedy time frame. As a penal statute it must be strictly construed. Edgartown v. State Ethics Comm'n, 391 Mass. 83, 98 (1984).

Qwest's response to the slamming complaints illustrates this point. The complaint of Mr. Cruz was the first of almost a dozen slamming complaints filed with the Department against Qwest. Towards the end of the hearing process (May 2000), Qwest had outlined its efforts to eliminate slamming by adopting a zero tolerance policy. See Affidavit of Maria Bertacchi at paragraphs 12-14, dated May 17, 2000 (part of record in Garcia-Rios). Qwest also, despite the

active efforts of the Department to resist Qwest's efforts to settle these disputes, began to settle the slamming cases.

The extreme prejudice to Qwest caused by the two year delay is apparent. The Department entered a decision over two years after the hearing on the matter, after all of the slamming cases against Qwest have been concluded, and after Qwest specifically adopted and took active measures to eliminate slamming. The combined failure of the Department to follow the mandatory ten day statutory deadline and to render such a harsh result against Qwest is a complete frustration of the statutory purpose and an extremely inequitable result to Qwest. By adopting these measures in response to the slamming complaints, Qwest has already effectively modified its conduct in the marketplace to ensure compliance with the statute. These measures have been a success, evidenced by the fact that there have been no new slamming complaints filed against Qwest with the Department.

At this juncture there is nothing more that Qwest can do to modify its conduct to ensure compliance with the statute. If the Department is to render adverse decisions against Qwest almost two years after Qwest addresses a problem and effectively resolves it, then Qwest and other carriers will have no incentive to modify their conduct if they will still be punished. The time for the Department to render effective guidance under the statute is long past due.

There is no doubt that, contrary to the decision of the Hearing Officer, given the detailed, precise and mandatory deadlines that the statute imposes, the penal nature of the statute, and the statute's clear intent to deter future misconduct, adherence to the 10 day deadline goes "to the essence of the thing to be done." Anthony Monico's Case, 350 Mass. 183, 185 (1966) (*citing Cheney v. Couglin*, 201 Mass. 204, 211 (1909)). Accordingly, to fulfill the goals of the Statute, as well as to enforce principles of equity and fairness, the only appropriate remedy is for the

Department to vacate the Ruling. See Commonwealth v. Cook, 426 Mass. 174, 181 (1997) (interpreting "shall" as mandatory and dismissing indictment for failure to comply with ten day administrative notice period). To ignore the statutory deadline and issue a decision on the merits over two years later violates the essence of the thing to be done.

Respectfully submitted,

QWEST COMMUNICATIONS CORPORATION

By its attorney,

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Dated: February 25, 2002

CERTIFICATE OF SERVICE

I, Damian R. LaPlaca, hereby certify that I have, this 25th day of February 2002, served a copy of the within Motion to File Appeal of Hearing Officer's Ruling by regular mail on Complainant Carlos Cruz, and by hand on the Secretary of the Department of Telecommunications and Energy, One South Station, 2nd Floor, Boston, Massachusetts 02110

Dated at Boston, this 25th day of February 2002.

Damian R. LaPlaca

(BS78118)